84568-9

No. _____

Appeals No.: 63644-8-I

SUPREME COURT

OF THE STATE OF WASHINGTON

MICHAEL GRASSMEUCK, INC.,

Respondent,

v.

TIMOTHY McSHANE,

Petitioner.

McSHANE'S PETITION FOR DISCRETIONARY REVIEW

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APPENDIX

A. Identity Of Petitioner

Timothy McShane is the petitioner here and was the defendant in the Superior Court.

B. Court Of Appeals Decisions

Mr. McShane seeks discretionary review of Division One's opinion in his case of Grassmueck (as Chapter 7 Trustee) vs. Timothy Mcshane. Mr. McShane also seeks discretionary review of Division One's orders denying his motion for reconsideration and his motion to supplement the record. Copies of those matters are in the Appendix. Mr. McShane's motion to publish was pending at the time this petition was filed.

C. Overview Of Issues On Review

Division One's opinion in this case squarely conflicts with and constitutes a repudiation of Division Two's opinion in Rose v. Fritz, 104 Wn. App. 116 (Div. 2, 2001).

The Trial Court dismissed the lawsuit below because a default order and default judgment were entered against Mr. McShane in favor of a person not the real party in interest.

In the Trial Court, without first moving to reopen the clearly closed pleadings, the Trustee attempted to amend the closed pleadings to name himself as the correct real party in interest.

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Applying the authority of Rose v. Fritz, 104 Wn. App. 116 (Div. 2, 2001) the import of the Trial Court's order was to hold the final orders of default and judgment (entered a full two years earlier) closed the pleadings and absent the Trustee first filing a proper motion to reopen the pleadings, with a proper showing that the pleadings should be reopened, the Trustee could not simply amend closed pleadings to correct the real part in interest defect. Thus, left with closed pleadings and a judgment entered in the name of a person not the real party in interest that was not simply voidable but was void, the Trial Court properly concluded it had no discretion: the void default order and judgment had to be vacated on Mr. McShane's motion.

Division One in this case reversed the Trial Court's order. Division One held, squarely contrary to Rose, that the Trustee should have been allowed to amend the pleadings without first moving to reopen them. Division One justified that conclusion by the rationalization that Mr. McShane's mere act of moving to vacate the void default order and judgment reopened the pleadings, making those final orders "not final."

Division One's decision not only conflicts with Division Two in Rose, it undermines the sanctity of what a final order even is.

D. Issues Presented For Review

1. Whether Division One erred when it reversed the Trial Court by finding (1) a mere motion to vacate a final order opens the pleadings transforming a final order into an

unfinal order; (2) the Trustee could amend the pleadings while they were still closed in order to correct a real party in interest defect;

2. Whether Division One erred by denying Mr. McShane's motion for reconsideration;

3. Whether Division One erred by denying Mr. McShane's motion to supplement the record.

E. Statement Of Case

The lawsuit below was filed by Joan Melnik, alleging she slipped and fell on the property of Timothy McShane on **June 15, 2002.** CP 88.

On **June 11, 2003** Ms. Melnik filed Chapter 7 Bankruptcy in Oregon. CP 73-96. She did not disclose the asset of her personal injury claim in her Bankruptcy schedules. CP 79-86.

On **June 13, 2005** Ms. Melnik filed suit against Mr. McShane, in her name and on her own behalf. CP 199.

Ms. Melnik was granted a full bankruptcy discharge on **July 17, 2005,** never having disclosed the asset of her injury claim. CP 71.

Ms. Melnik allegedly perfected service of her lawsuit against Mr. McShane on August 22, 2005. CP 61.[1]

On **November 2, 2005,** in her own name, Ms. Melnik obtained an order of the default against Mr. McShane. CP 223. On **August 4, 2005** in her own name, Ms. Melnik obtained a default judgment against Mr.

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[1] Mr. McShane filed a cross-appeal of the trial court's denial of his motion to vacate the default order and judgment for failure of service. Division One affirmed that decision but it is not a part of this motion for discretionary review.

McShane in the amount of $600,000. CP 224.

The disputed issue of service notwithstanding, Mr. McShane's first notice that a default order and default judgment had been entered against him was February 4, 2008 when he was served with a notice to attend a post judgment deposition for the purpose of collection. CP 89.

Upon learning of the default order and default judgment against him, Mr. McShane initially filed a motion to vacate those orders on the theory of judicial estoppel, arguing Ms. Melnik was barred from asserting a civil claim against him when she did not identify as an asset in her sworn Bankruptcy schedules. CP 42-55. He also moved to set aside the orders based on failure of service. Id.

The Trustee filed a motion to substitute into the case. CP 246-251.

The Trial Court deferred ruling on Mr. McShane's motions, allowed the Trustee to substitute into the case in order to defend Mr. McShane's attempt to vacate the default order and judgment, and stayed proceedings to allow the parties to take discovery on the service issues. CP 226-229.

However, the Trial Court explicitly rejected language proposed by the Trustee that the mere amendment of the case caption and substitution so the Trustee could defend against the motion to vacate would "relate back" to the original filing of the complaint. Id.

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When Mr. McShane returned to the trial court following the continuance he filed a new motion to vacate in light of discovery and added as additional support, argument that the default order and judgment as being void for having been entered in the name of a person not the real party in interest. CP 125-138.[2]

Mr. McShane responded to the Trustee's attempt to amend the pleadings without first reopening them indicating that it would be appropriate that the Court enter some type of order that would allow the Trustee to participate in the proceedings, but that it would be inappropriate without a further showing to allow such an order to have the effect of reopening the pleadings, amending the pleadings, and thus correcting the real party in interest defect such that the amendment would "relate back" to the default order and default judgment. (Appendix, pg. A-12). Mr. McShane had already raised the real party in interest defect which the court had still not ruled on. CP 125-138.

The Trial Court denied Mr. McShane's motion to vacate. CP 1.

Mr. McShane filed a motion to reconsider. CP 7-20. And demonstrating that the parties and the Trial Court full well understood that the Trial Court's striking the proposed language of the Trustee that the

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[2] It is notable that Division One's opinion asserts Mr. McShane did not raise the real party in interest defect until his motion for reconsideration and held the Trial Court abused its discretion in considering that issue for the first time on reconsideration. CP 125-138 is Mr. McShane's briefing before reconsideration and he clearly raised the issue then.

October 15, 2008 order amending the case caption was ever intended to constitute a reopening of the pleadings and amending them to "relate back" to the original complaint, the Trustee in response to Mr. McShane's motion for reconsideration made a motion – not as a properly noted motion but as a part of his response to Mr. McShane's motion for reconsideration – that the prior amendment should relate back to the original complaint. CP 21-26.

The Trial Court, on May 22, 2009 considering that previously reserved issue, struck the Trustee's late motion to "relate back," CP 232, and granted Mr. McShane's motion for reconsideration and vacated the defective and void default order and default judgment. CP 230.

On appeal, Division One reversed the Trial Court's order. That opinion speaks for itself. However, two issues of error are notable.

First, Division One held Mr. McShane did not raise the real party in interest defect until reconsideration and that the Trial Court abused its discretion in considering that "new" argument at that time.

But second, holding that even if the Trial Court properly considered the real party in interest issue, the Trial Court erred in dismissing the case because Mr. McShane's merely filing a motion to vacate somehow made the final orders of default and judgment (which had been in effect for over two years) no longer final and therefore the Trustee should have been allowed to amend the pleadings at his will to correct

them.

F. Argument Why Review Should Be Accepted

1. Acceptance Of Review Satisfies RAP 13.4(b)

As to the four grounds for review provided by RAP 13.4(b), Mr. McShane relies on three. The decision of Division Two from which review is sought:

(1) ...is in conflict with the Supreme Court

(2) ...is in conflict with a decision of another division of the court of appeals; and

(3) ...involves an issue of substantial public interest that should be determined by the Supreme Court.

2. Standard Of Review

The standard of review for orders on a motion to vacate differ depending on whether the motion to vacate is granted or denied. When a Trial Court grants a motion to vacate a default order or default judgment, that decision is reviewed for an abuse of discretion. Morin v. Burris, 160 Wn.2d 745, 754 (2007).

3. The Decision Conflicts With Division Two, The Civil Rules, Rules Of Appellate Procedure, And The Supreme Court

a. IT WAS NOT ERROR FOR THE TRIAL COURT TO STRIKE THE DEFECTIVE ORDER OF DEFAULT AND JUDGMENT

In all material respects, Rose is on all fours with the case at bar.

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In Rose, a husband sued on behalf of his deceased wife's estate in his individual capacity without being appointed the state's personal representative. Rose, 104 Wn.App. at 118. Only after summary judgment dismissal based on the real party in interest defect did the husband obtain an order appointing himself the PR of his wife's estate. Id. at 118-119.

Without any motion to reopen the pleadings, much less a sufficient showing justifying reopening the pleadings or an order reopening the pleadings, the Trial Court in Rose allowed the husband to amend the pleadings to correct the real party in interest defect, substituting himself in the capacity of the estate's PR as opposed to himself personally. Id.

In Rose, Division Two reversed the Trial Court's order. Rose found the summary judgment order was a final order closing the pleadings, and that closed pleadings may be amended only if first reopened as "authorized by statute or court rule." Id. at 120. Because the husband did not move to reopen the pleadings first, his motion to amend should have been denied.

In an instance such as Rose (and the case at bar) CR 59 or 60 may provide a basis to reopen closed pleadings. But regardless of which rule is used, absent **first** a motion to reopen the pleadings, supported by sufficient facts, and **second** an appropriate order with findings of fact justifying reopening the pleadings, Rose held a final judgment remains final and may not be altered or amended merely on a motion do so. See id. at 121.

b. IT WAS NOT ERROR FOR THE TRIAL COURT TO RULE ON RECONSIDERATION

Most simply, Mr. McShane raised this issue before reconsideration.

Although the Trial Court erred the first time when Mr. McShane raised the real party in interest issue, it arrived at the correct decision on reconsideration when it determined the default order and judgment in the name of a person not the correct real party in interest was not simply voidable but void, and as such the Trial Court had no discretion but to vacate it. Allstate Ins. Co v. Khani, 75 Wn.App. 317, 326-327 (1994).

However, because the real party in interest defect is jurisdictional the issue may be raised at anytime. Id. Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556 (1998) and Union Bay v. Cosmos Development, 127 Wn.2d 614, 618 (1995). Allstate cited with approval Brenner v. Port of Bellingham, 53 Wn.App. 182, 188 (1989) that vacated a judgment that was void for lack of jurisdiction 16 years after it was entered.

Thus, even if Mr. McShane raised this issue on reconsideration for the first time it was not an abuse of discretion for the Trial Court to have decided it on reconsideration. Mr. McShane could have filed an entirely new motion later - it would not have been time-barred. The Trustee had no less an opportunity to be heard on reconsideration than if Mr. McShane

filed a new motion. It was error for Division One to hold the Trial Court abused is discretion.

c. DIVISION ONE ERRED IN ITS CONSIDERATION OF THE TRIAL COURT'S STRIKING LANGUAGE THAT THE AMENDMENT RELATED BACK

The Trial Court's crossing out language proposed by the Trustee that the "amendment" would "relate back" to the original complaint was acknowledged, but disregarded, by Division One.

In light of the procedural posture of the case when that order was entered, the Trial Court's choice of what language it would not use should be accorded weight. At that point in the proceedings, the Trustee had filed no motion to reopen the pleadings. But, he was wanting to substitute into the case in order to file pleadings.

The Trustee provided the Trial Court language (that the amendment would relate back) that would have given the Trustee precisely what he wanted, that this was not simply an amendment in name but in substance to cure the real party in interest defect – and the Trial Court struck it. It must be conceded that if the order affirmatively said that there was no relationship back, that would be more clear evidence of intent. But, that there could have been a 'more clear' statement of intent does not mean the Trial Court's striking that language should be ignored.

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However, and most critical, if the Trial Court's striking that language is accorded no weight as Division One held, that makes this case that much more identical to Rose – not less.

Assuming the Trial Court in this case intended the amendment would relate back, which is the import of Division One's discounting the stricken "relation back" language, that would render the case at bar essentially identical to Rose: In both cases, with final orders, the Trial Courts amended pleadings to relate back with no showing the pleadings should/could have been reopened much less an order doing so.

Division Two in Rose squarely held that was error. Division One in this case squarely held it was not error.

d. MR. McSHANE'S FILING A MOTION TO VACATE DID NOT TRANSFORM THE FINAL ORDERS INTO NON-FINAL ORDERS

Division One's decision fundamentally conflicts with Division Two in Rose on another critical issue: Division Two in Rose held that a summary judgment order entered "without prejudice" was a sufficiently "final order" that required reopening the pleadings before an amendment to them could be made. Rose, 104 Wn.App. at 120-121.

According to Rose, once the pleadings were closed, only the Trial Court on a proper motion may reopen them:

> Once a judgment is final, a court may reopen it only if authorized by statute or court rule.

Id. at 120.

Division One's holding is in direct conflict, holding that the orders were not final because "Mr. McShane's motion to vacate the default judgment was pending." (Opp. p. 6). CR 59 and 60 are clear: only the Trial Court, if authorized by court rule or statute, may reopen a final order; or stated another way, only the trial court has the authority to make a final order "not final." CR 59/60 and Rose are clear that authority is strictly circumscribed.

Division One's opinion however confers that authority on a mere party, under no showing at all. According to Division One's opinion in this case, merely filing a motion renders a final order, not a final order such that the pleadings are automatically reopened and may be amended at will.

The import of Division One's holding thus conflicts not only with Division Two and the Civil Rules, and not intending to be disrespectful of Division One, it is suggested to be a conclusion that simply cannot be reconciled with law.

There can be no reasonable dispute but that the default order and judgment were final orders. If nothing else, clearly the default judgment was a "final judgment entered in any action or proceeding" under RAP 2.2(a)(1). If Mr. McShane had notice of it, he could have appealed it as a matter of right. Id. There is no more "final order" in the Trial Court than

a final order of judgment. It is also a final order under Division One's own definition of the term in Bank of America NA v. Owens, 153 Wn.App. 115 (2009) as it determined the litigation and left "nothing for the court to do but execute the judgment." Id. at 126. Rose amply explained that even a mere summary judgment order without prejudice is sufficiently final to close the pleadings.

The order in this case was so final that it had been in existence for two years and Ms. Melnik was proceeding to collect on it.

To bring this full circle to the issue described above, Division One's workaround of those final order definitions was its holding that Mr. McShane's merely filing a motion to vacate rendered the final orders not final. For support, Division One cited Purse Seine Vessel Owners Ass'n v State, 92 Wn.App. 381 (Div. 2 1998). Purse Seine Vessel provides no authority for Division One's conclusion – and if it did, it would itself be plainly contrary to well established law.

It is well settled by this Supreme Court that a post-judgment or post-order attack does not render an order any less final; every order of a Trial Court remains in full force and effect until it is actually reversed or vacated. See Dike v. Dike, 75 Wn.2d 1, 9 (1968). That is true even of an "erroneous decision (because it remains) as binding as one that is correct until set aside or corrected in a manner provided by law." Id. at 8. See also, Spahi v. Hughes-Northwest, Inc., 107 Wn.App. 763 (2001) ("it is

well-established that an appeal will not affect the validity of a judgment.").

Division One in this case, holding that a mere motion to vacate renders a final judgment not final also directly conflicts with the Supreme Court's decision in State v. ANW Seed, 116 Wn.2d 39 (1991). In ANW Seed this court, in the context of evaluating what is needed to merely supersede a judgment for collection, (much less make it "not final"), rejected the argument that filing a notice of appeal called the judgment into doubt. Id. at 44. This court indicated that such a proposition was plainly contrary to RAP 7.2(c) and RAP 8.1. Id. Which, brings the issue back to Division One's citation to Purse Seine Vessel Owners.

At the risk of being conclusory, Purse Seine Vessel Owners simply did not hold that filing a motion to vacate a final order changes the order into a non-final order – much less did it address the issue of reopening the pleadings. If anything, it appears the case (addressing the appealability of a declaratory judgment order) held the opposite of how it was cited by Division One and actually supports Mr. McShane's position, concluding "a declaratory judgment has the force and effect of a final judgment... therefore, the trial court's ruling is appealable as a final judgment." Id. at 387. Mr. McShane asked on reconsideration and he asks here again: how was the final order of default and/or final order of judgment not a "final order" under that standard.

e. DIVISION ONE'S OPINION CREATES AN IMPOSSIBLE CATCH-22 OF LAW

It is undisputed the Trial Court was confronted with a defective default order and judgment; jurisdiction had never been obtained over the correct real party in interest. When that was called to the attention of the trial court, it was without a discretion: it was required to vacate those orders.

It was never disputed by Mr. McShane that the Trustee was the correct real party in interest.

But, and despite the machinations of the Trustee then and since to justify his not moving to reopening the pleadings before seeking to amend them, it is manifest that the Trustee never moved to reopen the pleadings that were closed by the final order of default judgment. And as such, those pleadings have been and remain now, closed. Closed, with defective orders, entered in favor of a person not the real party in interest.

Mr. McShane never attempted to gainsay to Division One – or the Trial Court for that matter – what would have been the proper result if the Trustee had not disregarded Rose and made a properly supported motion to reopen the pleadings in order to amend them. It might be that the Trustee could have made a motion sufficient to justify reopening the pleadings.

We do not know.

What we do know, and what Division One knew, was that the Trustee never brought such a motion. And not having brought such a motion, the pleadings remained closed.

It is acknowledged Washington's case law demonstrates a certain latitude toward Bankruptcy Trustees in pursuing assets of debtors. For instance, a Bankruptcy Trustee is not judicially estopped by the fraud of the debtor in failing to disclose the asset of a cause of action on his or her bankruptcy schedules. However, latitude in the process cannot be elevated to the level of abrogation of the process.

It would require the creation of two sets of Civil Rules, one for Bankruptcy Trustees and one for everyone else (for instance, the husband in Rose) for Division One to not give effect to the fact the pleadings in this case were closed and never reopened before the Trustee attempted to amend them to correct the real party in interest defect.

Ultimately, the holding of Division One in this case not only creates an irreconcible conflict with Division Two, the Civil Rules, and the decisions of this Supreme Court, standing alone it creates an impossible Catch-22 that the law should not tolerate.

There was and is no dispute but that the default order and judgment against Mr. McShane were fundamentally defective, being entered in favor of a person not the real party in interest. They were void. But, despite their defect the person not the real party in interest (Ms. Melnik)

was using those defective orders in collection proceedings to attempt to take money from Mr. McShane.

Being confronted with the very real jeopardy of being deprived of his property (a Constitutional interest), Mr. McShane moved to vacate those void orders.

But, according to Division One, Mr. McShane's merely filing a motion to vacate those defective orders was not simply a substantial step toward fixing them – it in essence did fix them. Merely by bringing to light the defect by his motion to vacate, by Division One's holding, Mr. McShane cut at least four procedural steps out of the process for the Trustee, all of which were in doubt; (1) no motion to reopen, (2) no factual showing to reopen, (3) no statutory or Civil Rule basis to reopen, (4) no order granting a motion to reopen supported by findings and conclusions.

It is possible to discuss the nuances of final orders, real party in interest, and related matters ad infinitum. But, that does not address the core issue: what is a civil defendant with a defective order entered against him to do in this situation. **Under Division One's holding, If they allow the defective order to stand, they will loose their property rights through collection. If they defend themselves from it, they correct the defect.**

It would be unfair and misplaced for the Trustee to respond that this is the penalty Mr. McShane must endure for allowing a default to be

entered against him. This same issue could arise following a jury trial where the defendant, who appeared and defended, later learns the plaintiff was not the real party in interest. Such a judgment would be no less void. But, such a defendant would be in no less a predicament.

The rule at issue in this case must fit all circumstances. There cannot be one procedure to defend a defective judgment if entered on default and one if entered following a defended motion or trial.

Ultimately, and to be blunt, Division One appears to have given no weight to Rose and no consideration to the ripple effects of its holding. Instead, the opinion reads as though this were a simple issue of a Bankruptcy Trustee stepping into the shoes of a debtor to pursue the asset of the debtor's cause of action. That was not well taken.

4. The Court Erred By Denying Mr. McShane's Motion To Supplement The Record

Division One asked where certain matters could be found in the record. This is related to the issue discussed above regarding Division One's conclusion that Mr. McShane did not raise the real party in interest issue until reconsideration. As cited above, he clearly did.

But to make it even more clear, Mr. McShane moved to supplement the record with even more material that was considered by the Trial Court on the order under review. (Appendix). Division One denied Mr. McShane's motion.

Although no particular standard of review could be found on this issue, it is conceded to likely be an abuse of discretion standard.

However, as briefed by Mr. McShane, there was no prejudice to the Trustee in supplementing the record, there was no dispute but that the material identified was a part of the record, and the material at issue was not only responsive to the question asked by the court but it also demonstrated that some of the facts affirmatively represented by the Trustee (and clearly relied upon by Division One) were patently incorrect.

The case of In re Estate of Black, 153 Wn.2d 152 (2004) was cited and appears to be directly on point. Mr. McShane submits Division One abused its discretion in denying his motion to supplement and asks this court to accept review of that decision.

5. Division One Erred In Denying Mr. McShane's Motion For Reconsideration

While not intending to give short shrift to this issue, on reconsideration Mr. McShane pointed out the same inconsistencies and conflicts to Division One as has to this Court. Division One's error in not granting reconsideration inheres in the foregoing.

DATED this 17th day of May, 2010.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: _____
Dan'L W. Bridges, WSBA #24179
Shellie R. McGaughey, WSBA #16809

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,	)	No. 63644-8-I
Appellant/Cross Respondent,	)	UNPUBLISHED OPINION
v.	)	
TIMOTHY C. McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,	)	
Respondents/Cross Appellant.	)	FILED: March 15, 2010

SCHINDLER, C.J. — Joan Melnik obtained a default judgment against Timothy C. McShane. After the default judgment was entered, the court granted the Chapter 7 trustee's motion to substitute as the real party in interest for Melnik. The trial court denied McShane's motion to vacate the default judgment. However, on reconsideration, the court granted McShane's motion to vacate on the grounds that the default judgment was not obtained by the real party in interest. The Chapter 7 bankruptcy trustee, Michael A. Grassmueck, appeals the order granting reconsideration and vacating the default judgment. McShane cross appeals the trial court's order denying his motion to vacate. We conclude the court erred in granting the motion to

reconsider and vacating the default judgment. We reject McShane's arguments in the cross appeal and affirm the order denying his motion to vacate the default judgment.

FACTS

In June 2003, Joan Melnik filed for Chapter 7 bankruptcy. On October 3, 2003, the bankruptcy court entered an order of discharge and closed the bankruptcy case.[1]

In June 2005, Melnik sued her landlord Timothy C. McShane and his spouse Julie McShane for injuries she received when she slipped and fell on the McShanes' property in June 2002. According to the declaration of service, the McShanes were served with the summons and complaint on August 22, 2005. The McShanes did not file an answer. In November 2005, Melnik obtained an order of default. In August 2006, a default judgment was entered against the McShanes for approximately $600,000.

Almost two years later, in May 2008, the McShanes filed a motion to vacate the default judgment. The McShanes argued that service was insufficient and that the McShanes had a meritorious defense, namely that Melnik failed to provide the McShanes with notice of the allegedly defective condition on the property. The McShanes also asserted Melnik did not disclose her personal injury cause of action against the McShanes in her bankruptcy case and Melnik failed to execute a CR 2A agreement proposed by McShane.

By order dated May 15, 2008, the trial court vacated the default judgment against Julie McShane for lack of personal jurisdiction and set a hearing as to the "Timothy

[1] The order of discharge reflects a closing date of October 3, 2003.

McShane's issues." The vacation of the default judgment against Julie McShane was not appealed, and she is not a party to this appeal.[2]

In May 2008, the Chapter 7 trustee Grassmueck filed a motion to reopen Melnik's bankruptcy because of previously undisclosed assets. The trustee argued it was in the best interests of Melnik's creditors to reopen the bankruptcy and administer the undisclosed assets. The bankruptcy court granted the trustee's motion and reopened Melnik's bankruptcy.

In October 2008, the trial court granted Melnik's motion to substitute the Chapter 7 bankruptcy trustee as the real party in interest in her lawsuit against McShane and to amend the caption to substitute the Chapter 7 trustee as the plaintiff.[3] The court stayed any action to execute on the default judgment pending the completion of discovery and the ruling on McShane's pending motion to vacate.[4]

In April 2009, McShane filed a supplemental motion to vacate the default judgment. McShane argued that the default judgment should be vacated because it

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[2] Any reference in this opinion to "McShane" is to Timothy McShane, unless otherwise specified. We do not consider McShane's argument that there is no basis to find service on Julie McShane sufficient. The decision to vacate the default judgment against Julie McShane was not appealed, and she is not a party to this appeal. Grassmueck makes no argument regarding service on Julie McShane, and the issue of the sufficiency of service on her is not before us.

[3] Grassmueck argues on appeal that McShane did not oppose the substitution of the trustee for Melnik. Only Grassmueck's pleadings regarding the motion to substitute the trustee and the court's order granting the motion are in the record. The order reflects that McShane did file responsive pleadings. We are unable, however, to ascertain the basis for McShane's opposition.

[4] Contrary to McShane's assertion, the trial court did not specifically reserve the issue regarding relation back of any amendment to the complaint. Rather, the court simply struck from Melnik's proposed order the provision stating "and the amendment shall relate back to the date the original complaint was filed."

was fraudulently obtained by someone other than the real party in interest, Melnik lacked standing, and service on Timothy McShane was insufficient.[5]

In April 2009, the court denied McShane's motion to vacate the default judgment. McShane moved for reconsideration. For the first time, McShane argued that the default judgment was void because it was obtained by a person who was not the real party in interest. The trial court granted the motion for reconsideration and vacated the default judgment. Grassmueck filed a motion to reconsider. The trial court denied the motion. Grassmueck appeals the order granting reconsideration and vacating the default judgment.[6] McShane cross appeals the order denying his motion to vacate the default judgment.

ANALYSIS

We review a trial court's decision to grant or deny a motion for reconsideration for abuse of discretion. Drake v. Smersh, 122 Wn. App. 147, 150, 89 P.3d 726 (2004). We also review a trial court's decision to set aside a default judgment for abuse of discretion. Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007).

Because McShane raised the argument that the default judgment was void because it was not obtained by the real party in interest for the first time in his motion to reconsider, Grassmueck contends that the trial court abused its discretion in granting reconsideration. We agree. CR 59 does not permit a party to propose a new theory of

[5] McShane listed other grounds but did not present argument on them.

[6] Grassmueck filed an amended notice of appeal to also appeal the trial court's June 12, 2009 order granting McShane's motion to dismiss the claims against him with prejudice.

the case in a motion for reconsideration. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999). Consequently, the trial court abused its discretion in considering McShane's new theory related to real party in interest on reconsideration.

Nonetheless, we also conclude that the trial court erred in concluding the judgment was void because the bankruptcy trustee was the real party in interest. All rights of action in which a debtor has an interest become property of the bankruptcy estate under 11 U.S.C. § 541. Linklater v. Johnson, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989). Here, although Melnik did not disclose her potential cause of action against the McShanes in her bankruptcy court schedules, her cause of action was nevertheless a part of her bankruptcy estate. See Crumpacker v. DeNaples, 126 N.M. 288, 293, 968 P.2d 799, 805-06 (1998) (cited in Sprague v. Sysco Corp., 97 Wn. App. 169, 178, 982 P.2d 1202 (1999)) ("A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed, including causes of action which the debtor fails to disclose in his bankruptcy schedules. This includes pre-petition and unliquidated claims for personal injuries.") (citation omitted). The trustee succeeded to Melnik's cause of action against the McShanes and was, therefore, the real party in interest. Sprague, 97 Wn. App. at 176. n.2 (the real party in interest is the person who possesses the right sought to be enforced).

Every action must be prosecuted in the name of the real party in interest. CR 17(a). Substitution of the real party in interest has the same effect as if the action had

been commenced in the name of the real party in interest. CR 17(a). Courts routinely allow a bankruptcy trustee to be substituted for a plaintiff-debtor. See Sprague, 97 Wn. App. at 177-79 (collecting cases); Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007); Bartley-Williams v. Kendall, 134 Wn. App. 95, 138 P.3d 1103 (2006).

On appeal, McShane argues that because the default judgment was final, the trustee could not be substituted as the real party in interest because the default judgment was final. This argument fails because the premise that the default judgment was final, is faulty. At the time the trustee was substituted as the real party in interest, McShane's motion to vacate the default judgment was pending. Accordingly, the default judgment was not, as McShane asserts, final. See Purse Seine Vessel Owners Ass'n v. State, 92 Wn. App. 381, 387, 966 P.2d 928 (1998) ("A judgment is considered final on appeal if it concludes the action by resolving the plaintiff's entitlement to the requested relief."). We conclude the trial court abused its discretion in reconsidering its order denying McShane's motion to vacate the default judgment based on the argument that substitution of the trustee was not proper.

McShane cross appeals the trial court's order denying his motion to vacate. McShane argues that the court erred in determining that service on him was valid.[7] We disagree. A declaration of service is presumed valid if it is regular in form and substance. State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 65, 7 P.3d 818 (2000).

[7] McShane filed a reply to Grassmueck's response to McShane's cross appeal. To the extent the reply is an improper surreply, we do not consider it. See RAP 10.1(b)(c). We likewise do not consider arguments Grassmueck raises for the first time in his reply brief. King v. Rice, 146 Wn. App. 662, 672, n.30, 191 P.3d 946 (2008), rev. denied, 165 Wn.2d 1049 (2009).

A declaration of service must state the time, place, and manner of service. CR 4(g)(7). Here, because the declaration of service on McShane states the time, place, and a manner of service as permitted by RCW 4.28.080(15), the declaration is presumptively valid. Accordingly, the burden is on McShane to show by clear and convincing evidence that the service was improper. Jenkins, 102 Wn. App. at 65; Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).

McShane testified that he was never served with the summons and complaint and, although he vaguely remembered buzzing a person into his secured apartment building, he claims that the individual did not identify himself and did not hand McShane any documents. The process server, however, testified that, although he did not remember the particular service on McShane, he would never have left the summons and complaint on McShane's doorstep or with a person who did not confirm that he or she lived at the address on the summons. As reflected in the process server's declaration of service, he served the summons and complaint on a male who refused to give his name, but who stated he was a resident of McShane's apartment. Service on a person who states that he lives at the residence, but refuses to give his name has been held valid in the face of a defendant's adamant denials of receipt of the documents. Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745 (1997). McShane has not met his burden of proving, by clear and convincing evidence, that the service was improper.

McShane also argues that the trial court erred by not granting his motion to vacate the default judgment on the grounds of lack of notice, that he was diligent in

moving to vacate once he learned of the default judgment, Melnik's fraud in failing to list the cause of action in her bankruptcy schedules, and the amount of the judgment. Resolution of a motion to vacate a default judgment is left to the sound discretion of the trial court, whose decision we will not disturb unless the trial court abused its discretion or its exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons. Hwang v. McMahill, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000).

To the extent McShane's motion to vacate under CR 60(b) was based on excusable neglect or the amount of the judgment, it was too late. CR 60(b)(1) (A motion to vacate a judgment based on excusable neglect or irregularity in obtaining a judgment or order must be made no later than one year after the judgment is entered). In addition, CR 60(b) is not a substitute for an appeal. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980) (citation omitted). A CR 60(b) motion is confined to matters extraneous to the final order or judgment and is limited to the propriety of the denial, not the impropriety of the underlying orders. Bjurstrom, 27 Wn. App. at 450-51. Further, McShane provided no authority to support his assertion that Melnik's failure to list the cause of action in her bankruptcy schedules was tantamount to fraud. And, as to McShane's argument regarding lack of notice, he fails to demonstrate that the trial court's rejection of that argument was an abuse of discretion. In sum, we conclude the trial court did not abuse its discretion in denying McShane's motion to vacate the default judgment.

CONCLUSION

We reverse the trial court's order granting McShane's motion to reconsider, the order vacating the default judgment, and the order of dismissal. We affirm the trial court's order denying McShane's motion to vacate the default judgment.

Schindler, C.J.

WE CONCUR:

Leach, J.

Ellington, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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April 20, 2010

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CASE #: 63644-8-I
Michael Grassmueck, Inc., App/Cr-Resp v. Timothy McShane and Julie McShane, Resp/Cr-Apps

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration and Motion to Supplement the Record entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Steven Gonzalez

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,	)	No. 63644-8-I
Appellant,	)	ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT THE RECORD
v.	)	
TIMOTHY C. McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,	)	
Respondents.	)	

Respondent-Cross Appellants Timothy C. McShane and Julie S. McShane filed a motion to supplement the record and a motion to reconsider the opinion filed in the above matter on March 15, 2010. A majority of the panel has determined these motions should be denied.

Now, therefore, it is hereby

ORDERED that respondent-cross appellants' motion to supplement the record and the motion for reconsideration is denied.

DATED this 20th day of April 2010.

Presiding Judge

FILED
COURT OF APPEALS, DIV #1
STATE OF WASHINGTON
2010 APR 20 PM 2:04

No. 63644-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL GRASSMEUCK, INC.,

Appellant/Cross-Respondent,

v.

TIMOTHY McSHANE,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S MOTION TO SUPPLEMENT THE RECORD

Dan'L W. Bridges, WSBA #24179
Shellie McGaughey, WSBA #16809
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I. Motion

Comes now respondent/cross-appellant McShane and pursuant to RAP 9.6 and 9.10 moves to supplement the record with the memorandum attached as Exhibit #1.

II. Argument

This court observed at footnote 3 that it could not locate Mr. McShane's opposition to one of the several motions regarding the substitution of the Trustee.

Mr. McShane has reviewed all of the designations, the Clerk's sub numbers, and the original file. The reason this court could not locate Mr. McShane's opposition was because it was not designated.

Not to disclaim the ability of Mr. McShane to file a responsive designation, which in fact was done on other issues, it is observed that it was not well taken for the Trustee to simply designate his own pleadings regarding orders he sought review of which is what he did on that particular issue. (Exhibit #2). The order the Trustee designated (Exhibit #3) clearly identifies the memorandum contained in Exhibit #1 as something the Trial Court considered in making its ruling. RAP 9.6 reflects a duty on the party seeking review to designate the full record the Trial Court relied on regarding the issue presented for review.

RAP 9.10 allows for the supplementation of the record if the party "made a good faith effort to provide those portions of the record required by rule 9.2(b)." In that event, the "appellate court will not ordinarily... affirm (or) reverse... because of the failure of the party to provide the appellate court with a complete record of the proceedings below..."

It is respectfully suggested for the reasons described below, Mr. McShane demonstrated good faith in attempting to provide the portions of the record at issue.

It is also suggested that the Trustee's making no attempt to designate the portions of the record necessary to provide a "complete record" on the issues he presented, but instead designating only his own filings to the exclusion of the material the Trial Court clearly based its decision on, was not good faith and is another factor supporting this motion.

There were a series of related motions all on the same issues. As the attached Clerk's docket demonstrates, the descriptions of those documents in the docket are perhaps slightly less than useful. (Exhibit #4) Mr. McShane was clearly under the belief that the brief was designated.

Although at times tempting on an appeal, Mr. McShane did not simply designate 'the whole file.' Instead, he took heed of the Rules' "encourag(ing) a party to limit the record on review to only those portions

necessary to prevent the issues raised on review," Wash. Appellate Desk Book, 1.52 (15-4). Mr. McShane was of the belief that that memorandum at issue had been designated in his own counter-designation; he made argument in this memoranda to this court based on it.

Whether to allow a party to supplement the record is an issue of discretion that must be exercised based on the specific facts before it. It would not be an abuse of discretion to supplement the record with that memo.

The memo speaks directly to several issues including (1) that the real party in interest defect was raised before reconsideration (although it was also raised before consideration in a brief that is already a part of the record), (2) that the Trial Court's crossing out of the language in its Order that the amendment did not "relate back" has a context, which is precisely that provided in the memorandum: that if anyone was to make any argument on the issue it would have to be Trustee and that allowing the Trustee "into the case" to make argument was not intended to resolve the ultimate questions of the real party in interest defect, the void judgment, and reopening the pleadings, but merely to allow the Trustee to file pleadings, and (3) it demonstrates Mr. McShane never agreed to the Trustee being named the "real party in interest" in terms of correcting the

void judgment, but only that he should be allowed some entre into the case to make filings on the motions then pending.

To the extent the Trustee does not dispute the foregoing issues, there is no prejudice to supplementation.

To the extent the Trustee does dispute the foregoing issues, the appropriateness of supplementation is that much greater.

It would be particularly inappropriate for the Trustee to argue Mr. McShane did not raise the issue until reconsideration, and did not object to his being named the "real party in interest," when that is so plainly not correct. Even if only as a matter of demonstrating a lack of candor by the Trustee and his certification of facts plainly without a good faith basis in fact, supplementation should be allowed.

Further, it is suggested the Trustee should not be able to use his own failure to completely designate the record as required by RAP 9.6 as a means to take positions which would be revealed to be without merit by the very documents he was required to, but did not, designate himself.

In regard to not simply allowing supplementation of pleadings already considered by the Trial Court, but admitting entirely new evidence, the court in Spokane Airports v. RMA, Inc., 149 Wn.App. 930 (Div. 3 2009) allowed new evidence because it was "important to the disposition of the subject matter jurisdiction issue..." Id. at 937.

Although the issue in this case is personal and not subject matter jurisdiction, that this is on a jurisdictional issue appears to point toward supplementation.

This court in In re Personal Restraint of Erickson, 146 Wn.App. 576 (Div. 1 2008) granted the Department's "Motion to Supplement the Record." Id. at 582, fn. 14. It must be conceded the opinion does not articulate why the motion was granted. But, it does not appear this court rejects such requests per se.

In re Estate of Black, 153 Wn.2d 152 (2004) granted a motion in the Supreme Court to supplement the record "in order to explain why the Court of Appeals is mistaken in this case," citing RAP 9.10 as "allowing the court to supplement the record in order to decide the merits of an issue on review." If the record may be supplemented as late as in the Supreme Court to demonstrate error of the Court of Appeals, supplementing the record now cannot be said to be inappropriate.

In re Higgins, 152 Wn.2d 155 (2004) granted a motion to supplement the record because the other party did not oppose the motion. Id. at 160. If the Trustee does not oppose this motion, Higgins suggests this motion should be granted. If the Trustee does oppose the motion, it is not inappropriate to ask why he does.

There are additional cases upholding supplementation, just as there are cases denying supplementation. Additional citation to cases is not illuminating.

In conclusion, supplementation would be an appropriate use of this Court's discretion.

However, it must be noted that this motion is not intended to undermine the position of Mr. McShane in his motion for reconsideration. He does not waiver from his contention that the issues contained in his memo he seeks to supplement the record with should be a moot point. Even if the issue of real party in interest was not raised until reconsideration, and even if the Trial Court did intend to allow the amendment to relate back, none of that alters the rule of Rose or that the issue of the void judgment could be raised at any time.

Thus, supplementation should be allowed because it clearly answers the question posed by this Court in its footnote 3 and provides additional context. But, whether or not the record is supplemented, Mr. McShane's motion for reconsideration should be granted.

DATED this 2nd day of April, 2010.

McGAUGHEY BRIDGES DUNLAP, PLLC

Dan'l W. Bridges, WSBA #24179
Attorneys for McShane

APPENDIX

EXHIBIT #1

Judge Steven Gonzalez
Hearing Date: Friday, October 10, 2008
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JOAN MELNIK, a single woman, Plaintiff, vs. TIMOTHY C. MCSHANE and JULIE S. MCSHANE, husband and wife, and the marital community comprised thereof, Defendants.	NO. 05-2-19294-1SEA **DEFENDANTS RESPONSE TO PLAINTIFF'S MOTION TO (1) SUBSTITUTE BANKRUPTCY TRUSTEE AS REAL PARTY IN INTEREST; (2) AMEND CASE CAPTION; AND (3) STAY PROCEEDINGS TO PERMIT DISCOVERY**

I. INTRODUCTION

Defendant Timothy McShane ("McShane"), by and through his attorneys of record, vigorously objects to plaintiff's request to stay the proceedings related to the pending Motion to Vacate the Default against Mr. McShane.

This request is contrary to the very Order plaintiff's counsel prepared when the previously entered Motion to Vacate was noted and argued. Moreover, by plaintiff's own admissions, this lawsuit, and therefore the default order and judgment, are void because plaintiff Melnik failed to disclose her pending claim (slip and fall) that she was well aware of in her prior bankruptcy proceeding. Authority is clear. Ms. Melnik had no standing to sue Mr. McShane and as such her judgment is void. Her claims are barred by judicial estoppel.

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Plaintiff is now attempting to correct her errors by seeking to substitute the bankruptcy trustee as the real party in interest. Plaintiff cannot have her cake and eat it too. It is fundamentally inconsistent to request the Court substitute the real party in interest and yet allow plaintiff to conduct discovery related to her **void** lawsuit. The Court should deny this request, which requests to allow a void judgment to stand, and order terms against the plaintiff.

Defendant has no objection to plaintiff's request to substitute the bankruptcy trustee as the real party in interest or amend the case caption. However, defendant's rights should not be prejudiced in so agreeing and defendant specifically reserves his right, if necessary, to move for summary judgment on all grounds including, but not limited to, judicial estoppels, statute of limitations, and/or the Relation Back Doctrine.

Finally, pursuant to the Court's June 18, 2008, Order Staying Further Proceedings, after entering an order related to this motion, the Court should immediately rule upon defendants pending Motion to Vacate the Default Order and Judgment. An order has been previously provide with defendants Motion to Vacate but an additional copy is attached. All briefing related to that motion has already been filed and is of record.

II. BRIEF SUMMARY OF FACTS

Defendants incorporate by reference the Statement of Facts in plaintiff's underlying motion.

To add more clarification, however, the Court should also consider the following:

This lawsuit arises out of a June 15, 2002, slip and fall accident on a property plaintiff Joan Melnik was renting from the defendants, Mr. McShane. Shortly thereafter, a claim was presented to the McShane's insurance company.[1]

[1] Declaration of Nancy Hershgold in support of Defendants Motion to Vacate Default

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Plaintiff filed for Chapter 7 bankruptcy with the U.S. Bankruptcy Court for the District of Oregon on June 11, 2003 – approximately one year after the accident and well after plaintiff first made a claim to Mr. McShane's insurance company.[2] The bankruptcy was discharged on July 17, 2005. As plaintiff now candidly admits, she "did not list her personal injury claim against Mr. McShane in the bankruptcy proceeding."[3]

Despite her misrepresentation to the bankruptcy court, plaintiff then filed this personal injury lawsuit on June 13, 2005 – two days before the expiration of the statute of limitations. Mr. and Mrs. McShane were legally divorced on the date plaintiff filed suit.[4] It is undisputed plaintiff failed to ever commence service upon Mrs. McShane. The claims against Mrs. McShane have since been dismissed. Moreover, Mr. McShane contends he was never served with plaintiff's complaint.[5]

Because Mr. McShane was never served, her did not appear or answer. Plaintiff obtained an ex-parte order of default on November 2, 2005. Nearly, one year later, a default judgment was entered on August 4, 2006 and plaintiff sought to enforce the default judgment entered in a suit where plaintiff had no capacity to sue. On February 4, 2008, Mr. McShane learned of the lawsuit when he was personally served with a notice to attend a post judgment deposition for February 22, 2008.[6]

On May 1, 2008, defendants moved to vacate the default when plaintiff refused to set aside the agreement per agreement of counsel. The grounds for the default, which have been fully briefed for the Court, included, among other things, plaintiff never properly perfected

[2] Bankruptcy Documents, Ex. 5 to Shellie McGaughey Declaration in support of Defendants Motion to Vacate
[3] Plaintiff's Motion to Substitute Bankruptcy Trustee at page 2.
[4] Declaration of Julie McShane and declaration of Tim McShane in support of Defendants Motion to Vacate Default.
[5] Tim McShane Decl. in support of Defendants Motion to Vacate Default.
[6] Tim McShane Decl. in support of Defendants Motion to Vacate Default.

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service upon either defendant and plaintiff's lawsuit was void since she failed to disclose her pending personal injury claims to the bankruptcy court.

In response to defendant's Motion to Vacate, on June 18, 2008, the Court entered an Order Staying Further Proceedings because of the bankruptcy stay. The Court indicated it would act following: (1) an order of the Oregon bankruptcy court granting defendants relief §362(a) stay or (2) further affirmative action in this court initiated by the trustee for the plaintiff's bankruptcy estate, whichever came "earliest."

III. STATEMENT OF ISSUE

The Court should not allow discovery on a void judgment and should proceed as it said would pursuant to its June 18, 2008, Order.

IV. EVIDENCE RELIED UPON

This Response is based on the records and files herein including the declaration of Timothy E. Allen, defendant's Motion to Vacate Default and supporting declarations of Tim McShane, Julie McShane, Nancy Hershgold, and Shellie McGaughey, along with supporting exhibits.

V. LEGAL AUTHORITY

Plaintiff makes three requests with this current motion: (1) substitute the bankruptcy trustee a real party in interest; (2) amend the case caption, and (3) stay proceedings to permit discovery.

While Mr. McShane does not object to the first two requests, he vehemently opposes the request to stay the proceeding to permit discovery. This issue is addressed first.

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A. The Court should deny plaintiff's request to stay the Motion to Vacate.

Plaintiff's request is contrary to the plain language of the June 18, 2008, Court Order Staying Further Proceedings. No discovery should be allowed. Plaintiff admits the prior default was void due to her failure to disclose her personal injury claims to the bankruptcy court. Plaintiff would not be seeking to substitute the trustee as the real party in interest if this were not the case. Terms should be imposed for plaintiff's egregious request.

1. Plaintiff's request is contrary to the June 18, 2008 Order.

Ironically, the June 18, 2008, Order was prepared by plaintiff's counsel. The order, entered in response to defendant's Motion to Vacate the Default, explicitly held that further proceedings in this case are stayed "pending the earliest of the following: (1) an order of the Oregon bankruptcy court granting defendants relief from the §362(a) stay or (2) further affirmative action in this court initiated by the trustee for the plaintiff's bankruptcy estate."[7] This is all that was required for the stay to be lifted. The Court would have acted on the motion in June but for the bankruptcy stay asserted while the motion was pending.

Upon substitution of the real party in interest the Court should rule on the pending Motion to Vacate the Default without further delay.

2. No discovery related to the pending Motion to Vacate should be allowed or is necessary because the default and proceedings were tainted and it is a void judgment.

Plaintiff should not be allowed to conduct discovery. Ironically, plaintiff specifically seeks to conduct discovery related to service of process of the complaint she now recognizes as being invalid. This egregious request by plaintiff must be denied.

[7] Order Staying Further Proceedings, June 18, 2008, attached as Ex. A to Declaration of Tim Callahan

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The Courts have recognized failure to disclose an outstanding claim or suit in a reorganization plan constitutes judicial estoppel and is thus grounds for summary judgment of the suit over the unreported claim. *See, Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005). Other courts have dismissed non-bankruptcy related lawsuits based on lack of standing to bring a pre-petition claim because the plaintiff failed to list the claim in his bankruptcy schedules. *See, Cusano v. Klein*, 264 F.3d 936, 945-46, (9th Cir. 2001).

The individual who fails to disclose the existence of a claim in bankruptcy proceedings loses his status as the real party in interest. Instead, the claim belongs to the bankruptcy estate and the trustee in bankruptcy is vested with standing to pursue it. *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989) (holding that debtor lacked standing to file lawsuit related to misrepresentation regarding a real estate transaction when he failed to list the pending claim in his prior bankruptcy proceeding). Moreover, when a trustee is unaware of an accrued right of action and, as a consequence, it is neither abandoned nor administered in the bankruptcy, it remains property of the estate. *Id.* at 570; *First Nat'l Bank v. Lasater*, 196 U.S. 115, 118-19 (1905).

This is clearly now a reverse tactic to cure the lack of capacity of Joan Melnik and her attorney had to file suit to begin with. It is undisputed Ms. Melnik failed to disclose her pending claim relevant to the underlying slip and fall accident to the bankruptcy court. This misrepresentation is clear and unequivocal grounds for vacating the judgment under CR 60(b)(4) and is surprisingly now being disputed.

The bottom line is plaintiff lacked standing to sue. Her claim is barred by judicial estoppel. She lacked standing when she filed suit and she lacks standing now. How the "new

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plaintiff" does not see the issue in mind boggling. Plaintiff's misrepresentation to the bankruptcy court makes her lawsuit, and the default order and judgment in particular, void. Plaintiff conceded she failed to disclose her claim in her bankruptcy proceeding.[8] The act of substitution further acknowledges she lacked standing to file suit.

Plaintiff is attempting to fix her fatal flaw by substituting the trustee as the real party in interest, on one hand, yet at the same taking an inconsistent position with the Order. That there is any discovery that would be relevant is a ruse. Plaintiff's absurd actions must be put in contest. In essence, plaintiff is seeking to conduct discovery to establish a complaint, which she now acknowledges was invalid, was properly served on the defendants. Even if it was based on the procedural posture of this case, it simply would not matter. To hold otherwise, flies in the face of established Washington law and all notions of common sense and justice.

Plaintiff's request must be flatly rejected.

B. Defendant has no objection to substitute the bankruptcy trustee as a real party in interest and amend the case caption subject to certain reservations contained in the Order.

As indicated at the outset, defendant does not object to plaintiff's request to substitute the bankruptcy trustee as the real party in interest and amending the case caption. However, an order allowing plaintiff to do so must be without prejudice and reserve defendant's right to assert judicial estoppel, the statute of limitation, and the Relation Back Doctrine, or other applicable defenses if necessary. Allowing plaintiff to amend the complaint should not prevent defendants from seeking summary judgment relief at a later date if applicable.

Plaintiff argues in her motion the amendment to her complaint should relate back to the filing of the original complaint. However, a determination on this issue is premature. The test

[8] Plaintiff's Motion to Substitute Bankruptcy Trustee at page 2.

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for relation back under CR 17(a) and 15(c) is "whether the defendant had notice of the lawsuit and accordingly was not prejudiced, and whether the real party plaintiff in interest ratified the lawsuit or sought to be substituted as a plaintiff within a reasonable time after objecting by the adversary." *Kommavongsa v. Haskell*, 149 Wn.2d 288, 317, 67 P.3d 1068 (2003).

Defendants dispute they ever had notice of the complaint because they were never served with the complaint. For these reasons there can be no relation back. However, this issue should be reserved as it is not before the Court at this time. No affirmative relief on relation back should be allowed.

C. **After entering an order related to this motion, the Court should immediately rule upon defendant's pending Motion to Vacate.**

As explicitly provided for in the June 18, 2008, Order, after the Court enters an order allowing the proceedings to go forward, the pending Motion to Vacate Default is ripe and justice should not be further delayed. All briefing has been submitted to the Court on that motion. The Court should grant the Motion to Vacate the Default Order and Judgment. No delays for discovery should be allowed.

VI. CONCLUSION

The Court should deny in part and grant in part, plaintiff's current motion as specifically requested in this brief and the attached order.

Moreover, the Court should impose terms against plaintiff since the position taken by plaintiff's counsel to request discovery on a void judgment is not advanced in good faith or supported by any legal authority. If it was the authority would have been set forth. It was not because there simply is none. The relief sought as to discovery is contrary to established law and the June 18, 2008 Order of this Court. We are shocked and disappointed at the current position being advanced to this court by a prior officer of the court that is so diametrically

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opposed and inconsistent to the facts and prior sworn affirmations filed and on record herein. Terms should be imposed in the amount of $1,800 to reimburse defendants for attorney fees incurred to respond to plaintiff's unnecessary motion as it relates to seeking discovery on a void judgment.

Dated this 8th day of October, 2008.

McGAUGHEY BRIDGES DUNLAP, PLLC

SHELLIE MCGAUGHEY, WSBA #16809
TIMOTHY E. ALLEN, WSBA #29415
Attorneys for Defendants McShane

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered via facsimile and legal messenger to:

Tim Callahan
Attorney at Law
600 1st Avenue, Ste 414
Seattle, WA 98104-2237

Dated this 8th day of October, 2008, at Bellevue, Washington.

Leslie K. Nims

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EXHIBIT #2

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF KING
INDEX TO CLERK'S PAPERS

Title: GRASSMUECK INC VS MCSHANE ET ANO

Case No.: 05-2-19294-1 SEA

Index Date: 01-26-2010

Appeal No.: 63644-8-I

Desg. Party: TIM CALLAHAN

Pages: 240 - 259

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46	DECLARATION TIM CALLAHAN	252 - 255
83	MOTION FOR ORDER TO SHOW CAUSE	258 - 259
40	MOTION SUBSTITUTE BANKRUPTCY	246 - 251
82	ORDER TO SHOW CAUSE	256 - 257

EXHIBIT #3

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik, Plaintiff, vs. TIMOTHY McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof, Defendants.	NO. 05-2-19294-1 SEA ORDER GRANTING PLAINTIFF'S MOTIONS TO: (1) SUBSTITUTE BANKRUPTCY TRUSTEE AS REAL PARTY IN INTEREST; (2) AMEND THE CASE CAPTION; AND (3) STAY PROCEEDINGS TO PERMIT DISCOVERY **(Clerk's Action Required – see * at page 3)**

THIS MATTER came before the court on plaintiff Joan Melnik's motion to: (1) amend the complaint to substitute the Trustee (Michael A. Grassmueck, Inc.) in the place of plaintiff Joan Melnik as the real party interest in this lawsuit; (2) amend the case caption to substitute Michael A. Grassmueck, Inc. for Joan Melnik as the plaintiff; and (3) stay any hearing on defendant's motion to vacate the default judgment in this case for 90 days in order to permit discovery.

The court has considered the following:

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☑ Plaintiff' moving papers as follows:

A. Plaintiff Joan Melnik's Motions to: (1) Substitute Bankruptcy Trustee as Real Party in Interest; (2) Amend the Case Caption; and (3) Stay Proceedings to Permit Discovery;

B. Declaration of Tim Callahan in Support of Motions to: (1) Substitute Bankruptcy Trustee as the Plaintiff; (2) Amend the Case Caption; and (3) Stay Further Proceedings to Permit Discovery;

C. Declaration of Michael A. Grassmueck;

☑ Defendant's responsive pleadings as follows:

A. Defendant's Response to Plaintiff's Motion to Substitute Bankruptcy Trustee as Real Party in Interest;

B. Declaration of Timothy E. Allen

☑ Plaintiff's reply pleadings as follows:

Plaintiff Melnik's Reply Memorandum and Request for Terms

Based on the foregoing, and good cause appearing, it is hereby ORDERED as follows:

1. ~~The plaintiff is awarded $250.00 in KCLR 7(b)(3)(E) terms due to the deefendant's late service pf the responsive pleadings to this motion pursuant to KCLR 7(b)(3)(C).~~ Plaintiff motion for terms is denied. SG

1.2. ~~There is no legal or factual basis underlying~~ defendant's motion for terms ~~and it~~ is denied. SG

2.3. The plaintiff's motion to amend the complaint to substitute the Chapter 7 Bankruptcy Trustee Michael A. Grassmueck, Inc. for Joan Melnik as the real party in interest herein is GRANTED. Michael A. Grassmueck, Inc. is substituted for Joan Melnik as the

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plaintiff ~~and the amendment shall relate back to the date the original complaint was filed~~. SQ

3.4. The plaintiff's motion to amend the case caption is GRANTED. In all future pleadings, the parties shall utilize the following case caption:

MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,	)
Plaintiff,	)
vs.	)
TIMOTHY McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,	)
Defendants.	)

* **The Clerk is directed to amend the record of this case to reflect the change in the party plaintiff from Johan Melnik to Michael A. Grassmueck, Inc.**

4.5. The plaintiff's motion to stay the defendant's motion to vacate the default judgment previously entered is GRANTED. The defendant's pending motion to vacate the default judgment herein is hereby STAYED for a period of 90 days from the date of this order in order to permit both parties to conduct discovery. The court will consider extending this stay beyond 90 days upon the motion of either party if discovery is not completed despite the best efforts of counsel in expediting the discovery process.

5.6. It is further ORDERED that any action to execute upon the existing default judgment is STAYED pending the completion of discovery and the court's ruling on the defense motion to vacate said judgment.

6.7. OTHER:

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DATED: Oct 13th, 2008.

JUDGE STEVEN GONZALEZ

Presented by:

Tim Callahan, WSBA #18490
Attorney for Plaintiff Joan Melnik and
Chapter 7 Trustee Michael A. Grassmueck, Inc.

Copy received, approved for entry and notice of Presentation waived by:

McGAUGHEY BRIDGES DUNLAP, PLLC

Shellie McGaughey WSBA #16809
Attorney for Defendants McShane

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EXHIBIT #4

Superior Court Case Summary

Court: King Co Superior Ct
Case Number: 05-2-19294-1

Sub	Docket Date	Docket Code	Docket Description	Misc Info
1	06-13-2005	SMCMP	Summons & Complaint	
2	06-13-2005	*ORSCS JDG0016	Set Case Schedule Judge Michael Hayden, Dept 16	12-04-2006ST
3	06-13-2005	CICS LOCS	Case Information Cover Sheet Original Location - Seattle	
4	08-26-2005	AFSR	Affidavit/declaration Of Service	
5	11-02-2005	ORDFL EXP0001	Order Of Default Ex-parte, Dept	
6	11-02-2005	MTDFL	Motion For Default /pltf	
7	12-30-2005	ORTSC	Order To Show Cause	02-02-2006JS
8	08-04-2006	DFJG EXP0001	Default Judgment Ex-parte, Dept	
9	08-04-2006	DCLR	Declaration Of Tim Callahan	
10	08-04-2006	MTDJ	Motion For Default Judgment	
11	08-04-2006	AFSC	Affidavit/declaration Sum Certain	
12	08-04-2006	AFSC	Affidavit/declaration Sum Certain	
13	08-04-2006	NT	Notice Suppl Repairs Of Disability	
14	02-05-2008	NTASCC	Notice Of Association Of Counsel	
15	02-15-2008	NTAPR	Notice Of Appearance /defts	
16	02-19-2008	NTHG	Notice Of Hearing /stay & Quash	02-20-2008
17	02-19-2008	NTHG	Notice Of Hearing /shorten Time	02-20-2008
18	02-19-2008	DCLR	Declaration Of Timothy Mcshane	
19	02-19-2008	DCLR	Declaration Of Julie S. Mcshane	
20	02-19-2008	DCLR	Declaration Of Nancy Hershgold	

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calender their caseloads on local systems, this search tool cannot diplay superior court calendering information.

Contact Information

King Co Superior Ct
516 3rd Ave, Rm C-203
Seattle, WA 98104-2361
Map & Directions
206-296-9100[Phone]
206-296-0986[Fax]
Visit Website
206-205-5048[TDD]

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21	02-19-2008	DCLR	Declaration Of Shellie Mcgaughey	
22	02-19-2008	MT	Motion To Stay Spplmntl Proc/def	
23	02-19-2008	MT	Motion To Short Time/defs	
24	02-20-2008	MM	Memo In Opp To Defs Mtn Short Time	
25	02-20-2008	DCLR	Declaration Tim Callahan	
26	02-20-2008	DCLR	Declaration Brian Fresonke	
27	05-02-2008	NTHG	Notice Of Hearing /vacate	05-12-2008
28	05-02-2008	MT	Motion To Vacate Default	
29	05-02-2008	DCLR	Declaration Of Shellie Mcgaughey	
30	05-02-2008	DCLR	Declaration Of Timothy Mcshane	
31	05-02-2008	DCLR	Declaration /julie S Mcshane	
32	05-02-2008	DCLR	Declaration /nancy Hershgold	
32A	05-08-2008	DCLR	Declaration Of Tim Callahan	
32B	05-08-2008	RPY	Reply-plaintiff	
33	05-09-2008	RSP	Response To Reply To Motion /def	
34	05-16-2008	ORV ACTION	Ord Vacate Dfl Jgmt Vs J Mcshane 8:30/gonzalez/hrg Sho Caus As To	06-13-2008
		ACTION	Timothy Mcshanes Issues	
35	06-13-2008	MTHRG JDG0005	Motion Hearing Judge Steven Gonzalez, Dept 5	
36	06-18-2008	ORSP	Order For Stay Of Proceedings Pendg	
-	06-18-2008	NTSYBK	Notice Of Stay Re: Bankruptcy	
37	09-30-2008	DCLRM	Declaration Of Mailing	
38	09-30-2008	DCLR	Declaration Of Michael Grassmueck	
39	09-30-2008	DCLR	Declaration Of Tim Callahan	
40	09-30-2008	MT	Motion Substitute Bankruptcy	
41	09-30-2008	NTHG	Notice Of Hearing /sub Trustee	10-10-2008
42	10-08-2008	RSP	Response To Mtn To Substitue Bankruptcy Trustee	
43	10-08-2008	DCLR	Declaration Of Timothy	

			E Allen	
44	10-09-2008	RPY	Reply/memo Requst For Terms/pltf	
45	10-09-2008	RPY	Reply /deft Sur-repy	
46	10-09-2008	DCLR	Declaration Tim Callahan	
47	10-10-2008	ORRAP	Order Substituting Party As Pltf; Amending Caption; And Stay Hrg For	01-12-2009
			90days On Hrg Mtn To Vacate	
		ACTION	Stay Lifted To Permit Discovery	
48	11-14-2008	NTAB	Notice Of Absence/unavailability	
49	12-16-2008	AFSR	Affidavit/dclr/cert Of Service	
50	12-30-2008	NTHG	Notice Of Hearing /mtn To Quash	01-08-2009
51	12-30-2008	MT	Motion To Quash Cr 30 (b) /defs	
52	12-30-2008	DCLR	Declaration Of Timothy E Allen	
53	01-06-2009	MM	Memorandum In Opposition /pla	
54	01-06-2009	DCLR	Declaration Re Opposition /callahan	
55	01-07-2009	RPY	Reply In Supp/mt To Quash/def	
56	01-09-2009	ORQ	Order Quashing Subpoena Duces Tecum	
57	01-09-2009	NTHG	Notice Of Hearing /extend Stay Hrg	01-20-2009
58	01-09-2009	MT	Motion For 90day Stay Of Hrg/pltf	
59	01-09-2009	DCLR	Declaration Of Tim Callahan	
60	01-12-2009	NTHG	Notice Of Hearing /compel	01-21-2009
61	01-12-2009	MTCM	Motion To Compel Def Responses/pltf	
62	01-12-2009	CRTC	Certificate Of Compliance	
63	01-13-2009	NTHG	Notice Of Hearing /prot Order	01-23-2009
64	01-13-2009	MT	Motion For Protective Order /deft	
65	01-13-2009	DCLR	Declaration /timothy Allen	
66	01-13-2009	DCLR	Declaration /shellie Mcgaughey	
67	01-14-2009	OB	Oppositn To Mtn 90 Day Extension	

68	01-14-2009	DCLR	Declaration Of Timothy E Allen	
69	01-15-2009	OB	Opposition To Mtn Fr Ord Compelling	
70	01-15-2009	DCLR	Declaration Of Shellie Mcgaughey	
71	01-16-2009	RPY	Reply To 90-day Extension / Pla	
72	01-20-2009	RPY	Reply Re Mtn To Compel/plt	
73	01-21-2009	RPY	Reply To Mtn For Prot Order/pltf	
74	01-21-2009	DCLR	Declaration Tim Callahan	
75	01-22-2009	RPY	Reply In Support Mt Prot Ord	
76	01-26-2009	ORDYMT	Order Denying Motion To Compel	
77	01-26-2009	ORSP	Order For Stay Of Proceedings	03-20-2009AU
78	01-26-2009	ORGMT	Order Granting Motion Re Prot Order	
79	02-04-2009	NTAB	Notice Of Absence/unavailability	
80	03-30-2009	ORDYMT	Ord Deny Mt To Show Cause To Vacate Default Ord & Default Jdmgt	
		EXP0007	Ex-parte, Dept. Seattle - Clerk	
81	03-30-2009	MTSC	Motion For Order To Show Cause/defs	
82	04-01-2009	ORTSC EXP0007	Order To Show Cause Ex-parte, Dept. Seattle - Clerk	04-16-2009
83	04-01-2009	MTSC	Motion For Order To Show Cause	
84	04-08-2009	NTHG ACTION	Notice Of Hearing 1:00/mtn To Vacate Default/def	04-16-2009
85	04-08-2009	MT	Motion/vacate Default/dft T Mcshane	
86	04-08-2009	DCLR	Declaration Of Shellie Mcgaughey	
87	04-14-2009	RPY	Reply Memo Oppos Mtn Vacate Dfjg/pl	
88	04-14-2009	DCLR	Declaration Of Isaac Delys	
89	04-15-2009	RPY	Reply To Vacate Default / Deft	
90	04-24-2009	ORDYMT	Ord Deny Mtn To Vacate Defaultjdgt	
91	05-04-2009	NTHG	Notice Of Hearing/9:00/reconsider	05-22-2009
92	05-04-2009	MTRC	Motion For	

			Reconsideration / Deft	
93	05-18-2009	RPY	Reply To Def Cr59(a)(7) (9) Mtn	
94	05-20-2009	RPY	Reply To Plf Oppon To Mt / Def	
95	05-20-2009	DCLR	Declaration Of Shellie Mcgaughey	
96	05-21-2009	MT	Motion To Strike Plf Req/def	
97	05-22-2009	ORGMT	Order Granting Motion Reconsider /vacate Dflt Jgmt	
			/vacate Dflt Jgmt	
98A	05-29-2009	NTHG	Notice Of Hearing /dismiss	06-09-2009
98B	05-29-2009	MTDSM	Motion To Dismiss	
99	06-01-2009	NTHG	Notice Of Hearing /reconsider	06-09-2009
100	06-01-2009	MTRC	Motion For Reconsideration /pla	
101	06-02-2009	ORDYMT	Order Denying Motion To Reconsider	
102	06-05-2009	RSP	Response To Motion To Dismiss/pla	
103	06-08-2009	RPY	Reply Re Mtn To Dismiss /defs	
-	06-09-2009	$AFF	Appellate Filing Fee	250.00
105	06-09-2009	NTAB	Notice Of Absence/unavailability	
106	06-11-2009	ORDSL	Order Dismiss Mr Mcshnae	
107	06-23-2009	NTCAP	Notice Of Cross Appeal	
108	06-30-2009	DSGCKP	Designation Of Clerk's Papers 63644-8/ Callahan/ Pgs 1-38	
			Trans Coa 7/22/2009	
109	07-07-2009	INX	Index Cks Pprs Pgs 1-38	
-	07-07-2009	$CLPR	Clerk's Papers - Fee Received 703080-cp/ Callahan/ Pd 7/20/09	44.00
110	07-07-2009	DSGCKP	Designation Of Clerk's Papers 63644-8/ Mcgaughey/ Pgs 39-217	
			Trans Coa 7/29/2009	
111	07-07-2009	NACA	Notice Of Appeal To Court Of Appeal /amended	
112	07-09-2009	INX	Index Cks Pprs Pgs 39-217	
-	07-09-2009	$CLPR	Clerk's Papers - Fee Received	114.50

			703103-cp/ Mcgaughey/ Pd 7/23/2009	
113	07-21-2009	NOTE	Cks Pprs Pgs 1-38	
114	07-24-2009	NOTE	Cks Pprs Pgs 39-217	
115	10-20-2009	DSGCKP	Designation Of Clerk's Papers-supp 63644-8/ Bridges/ Did Not Prepare	
116	10-23-2009	LTR	Letter Rejecting Designation	
117	10-26-2009	DSGCKP	Designation Of Clerk's Papers-amend 63644-8/ Bridges/ Pgs 218-235	
			Trans Coa 12/26/2009	
118	11-02-2009	INX	Index Cks Pprs Pgs 218-235	
-	11-02-2009	$CLPR	Clerk's Papers - Fee Received 703509-cp/ Bridges/ Pd 12/8/2009	34.00
119	12-09-2009	NOTE	Cks Pprs Pgs 218-235	
120	01-05-2010	DSGCKP	Designation Of Clerk's Papers-supp 63644-8/ Bridges/ Pgs 236-239	
121	01-06-2010	INX	Index Cks Pprs Pgs 236-239	
-	01-06-2010	$CLPR	Clerk's Papers - Fee Received 703728-cp/ Bridges/ Pd 2/11/10	27.00
122	01-22-2010	DSGCKP	Designation Of Clerk's Papers-supp 63644-8/ Callahan/ Pgs 240-259	
			Trans Coa 2/10/10	
123	01-26-2010	INX	Index Cks Pprs Pgs 240-259	
-	01-26-2010	$CLPR	Clerk's Papers - Fee Received 703795-cp/ Callahan /pd 2/2/10	35.00
124	02-08-2010	NOTE	Cks Pprs Pgs 240-259	
125	03-03-2010	NOTE	Cks Pprs Pgs 236-239	